(3)

No. 98-470

In The

Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

PETITIONER'S REPLY BRIEF

Petitioner Ruhrgas AG ("Ruhrgas") respectfully submits this Reply to the Brief in Opposition of Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S ("Respondents").

The question presented by this Petition is whether district courts are absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding subject-matter jurisdiction.[1] In this case, the Fifth Circuit answered this question in the affirmative. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 216, 217-20 (5th Cir. 1998); Pet. App. at A9-A20.[2] In *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996), the Second Circuit answered the same question in the negative. The federal district courts are caught in the

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[1] The Fifth Circuit held that a district court must decide subject-matter jurisdiction before personal jurisdiction in every removed case, regardless of the facts, circumstances, or issues presented in a particular case. The issue presented by this Petition is whether such mandatory sequencing of jurisdictional decisions is required by federal law. Because the relative strength or weakness of the parties' positions on the personal jurisdiction and subject-matter jurisdiction issues or the relative complexity of these issues is irrelevant under the Fifth Circuit rule, it is unclear why Respondents set forth facts and arguments pertinent to the personal jurisdiction and subject-matter jurisdiction issues in their Brief in Opposition. *See, e.g.*, Brief in Opp. at 2-4, 15 n.5. Nevertheless, the record in this case demonstrates that Respondents' Statement of Facts and their arguments based thereon are both wrong and misleading.

[2] In so holding, the *en banc* Fifth Circuit overruled prior Fifth Circuit authority which had answered the question in the negative. 145 F.3d at 221-22; Pet. App. at A20-A22.

middle, inasmuch as the choice between the Fifth Circuit's mandatory rule and the Second Circuit's discretionary rule has a real, practical effect on the district courts' management of their dockets. *See Steel Co. v. Citizens for a Better Environment*, ___ U.S. ___, 118 S. Ct. 1003, 1021 (1998) (Breyer, J, concurring) ("to insist upon a 'rigid order of operations' in today's world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost").[3]

In their Brief in Opposition, Respondents concede that "federal courts have jurisdiction to determine jurisdiction." Brief in Opp. at 7. Nevertheless, Respondents contend that "jurisdiction" in this context does not include personal jurisdiction. In making this argument, Respondents ignore this Court's decision in *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937), in which this Court held that personal jurisdiction "is an essential element of the jurisdiction of a district . . . court as a federal court, and that in the absence of this element, *the court is powerless to proceed to an adjudication.*"

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[3] Respondents contend that the mandatory rule is necessary to avoid delay in removed cases, and they point to this case as an example in point. Contrary to Respondents' contentions, the discretionary rule adopted by the Second Circuit enables the district courts to consider the most efficient manner of managing a removed case to minimize delay and expense. The mandatory rule adopted by the Fifth Circuit does not. Additionally, Respondents' allegation that Ruhrgas has delayed improperly the resolution of this dispute is baseless. Respondents elected to initiate this litigation in an improper forum. The resulting forum battle is of Respondents' own making.

(emphasis added)[4] Similarly, Respondents' discussion of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) conspicuously ignores this Court's statement in that case that "the validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter *and* the parties." 456 U.S. at 701 (emphasis added). Both subject-matter jurisdiction and personal jurisdiction are derived from the Constitution,[5] and both are essential elements of a federal court's power to proceed to an adjudication. Nothing in this Court's prior decisions supports the Fifth Circuit's conclusion that a district court must always consider the subject-matter element of its jurisdiction before determining personal jurisdiction, in exercising its inherent jurisdiction to determine jurisdiction.[6]

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[4] Although *Employers Reinsurance Corp. v. Bryant* is a case relied on prominently in the Petition (*see* Pet. at 8, 10), that case is never mentioned in the Brief in Opposition.

[5] Respondents assert in their Brief in Opposition at 7 that the district court's dismissal order was "based on a state law question of amenability to process. . . ." In fact, the dismissal was based exclusively on the district court's determination that the exercise of jurisdiction would violate the Due Process Clause.

[6] Nor does 5A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1350 (1990) support the Fifth Circuit's conclusion. The cases cited in support of the statement from section 1350 quoted by Respondents held that a court must decide a challenge to subject-matter jurisdiction before ruling on the merits or on a Rule 12(b)(6) motion. In alleging that the Petition in this case represents "an abrupt about-face" by Professors Wright and Miller, and that "[b]efore appearing here, their statements regarding the threshold nature of subject matter jurisdiction were unequivocal," Respondents apparently

Leroy v. Great W. United Corp., 443 U.S. 173 (1979), cited by Respondents, provides no such support. This Court noted in *Leroy* that personal jurisdiction and venue are not fundamentally preliminary in the sense that subject-matter jurisdiction is, given a defendant's ability to waive personal jurisdiction or venue arguments. *Leroy* addressed only the question whether personal jurisdiction always must be decided before venue. Nothing in *Leroy* questions this Court's prior decision in *Employers Reinsurance*, which established that personal jurisdiction is an essential element of the district court's jurisdiction without which the Court is powerless to proceed to an adjudication. Three years after *Leroy* was decided, this Court reaffirmed that principle in *Insurance Corp. of Ireland*, 456 U.S. at 701. *Leroy* neither presented nor decided the question whether subject-matter jurisdiction must be determined before personal jurisdiction in every case.[7]

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overlooked what is said in 14C WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3d § 3739, at 462 (1998):

> A number of federal courts, including some courts of appeals, have held that even if the federal district court lacks subject matter jurisdiction over a removed action, it may entertain a motion by the defendant to dismiss for lack of personal jurisdiction or various other related threshold matters before passing on the motion to remand.

[7] Nor did *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998), also relied on by Respondents, present or decide that question. *Pacheco de Perez* held that a district court must determine subject-matter jurisdiction before considering a *forum non conveniens* motion. It is completely settled that *forum non conveniens* does not come into play unless the court in which the

Respondents' reliance on *Steel Co. v. Citizens for a Better Environment*, likewise is misplaced. In *Steel Co.*, this Court repudiated the practice of " 'assuming' [subject-matter jurisdiction] for the purpose of deciding *the merits*." 118 S. Ct. at 1012 (emphasis added). *Steel Co.* is inapplicable because the district court did not assume the existence of subject-matter jurisdiction,[8] and the district court did not decide "the merits."

In an effort to stretch *Steel Co.* to cover this case, Respondents argue that the district court's decision on the personal-jurisdiction question was "a merits-based ruling." Brief in Opp. at 10. However, a dismissal for lack of personal jurisdiction does not operate as an adjudication on the merits. *Kendall v. Overseas Development Corp.*, 700 F.2d 536, 539 (9th Cir. 1983); *Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 360 (3d Cir. 1983); *cf. Costello v. United States*, 365 U.S. 265, 284-86 (1960) (dismissal order in question was a

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action was brought has both subject-matter and personal jurisdiction. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Both subject-matter jurisdiction and personal jurisdiction raise constitutional issues going to the court's power to adjudicate the case; *forum non conveniens* raises no constitutional issue, nor does it affect the court's power to adjudicate the case.

[8] Respondents' assertion that the district court in this case "assum[ed] that the court hypothetically had the power to retain the case . . . " (Brief in Opp. at 14) is wrong. The district court applied prior Fifth Circuit authority holding that district courts have discretion to reach personal jurisdiction first in a removed case without deciding the question whether subject-matter jurisdiction exists. Pet. App. at B10. The district court never decided the subject-matter jurisdiction issues raised by the motion to remand.

dismissal for lack of jurisdiction that did not operate as an adjudication on the merits). Rule 41(b) of the Federal Rules of Civil Procedure expressly provides that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits. FED. R. CIV. P. 41(b). Because the district court's dismissal of this case was a dismissal for lack of jurisdiction, it does not operate as an adjudication on the merits, and *Steel Co.* is inapplicable.

Respondents argue that there is "no conflict with the Second Circuit." Yet, Respondents do not and cannot contend that the Fifth Circuit's decision does not conflict with the Second Circuit's decision in *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d at 155, which expressly upheld the district court's dismissal of a removed case for lack of personal jurisdiction without reaching the subject-matter jurisdiction issue raised by the plaintiff's motion to remand. Respondents merely assert that *Cantor Fitzgerald* is a nullity because it purportedly is inconsistent with the Second Circuit's prior decision in *Rhulen Agency, Inc. v. Alabama Insurance Guaranty Ass'n*, 896 F.2d 674 (2nd Cir. 1990).[9] *Rhulen* was not a removal case, but was a case originally filed in federal court. The Second Circuit in *Rhulen* held that the district court should have taken up the motion to dismiss under Rule 12(b)(1) because a dismissal for lack of subject-matter jurisdiction would

[9] Respondents also assert that *Cantor Fitzgerald* was "invalidated" by this Court's decision in *Steel Co.*, 118 S. Ct. at 1012. Brief in Opp. at 16. As shown *supra* at 5-6, *Steel Co.* rejected the hypothetical assumption of jurisdiction to decide the *merits*. It does not address the question of which of two jurisdictional issues must be resolved first.

have rendered moot the personal-jurisdiction issue.[10] In *Cantor Fitzgerald*, the Second Circuit cited *Rhulen* for the proposition that a district court may not first decide a challenge to personal jurisdiction *unless* the personal jurisdiction question is easier to resolve than the subject-matter jurisdiction question. *Cantor Fitzgerald*, 88 F.3d at 155. Judge Newman was a member of the panels in both *Rhulen* and *Cantor Fitzgerald*. *Cantor Fitzgerald* represents the law of the Second Circuit on the question whether a district court may take up personal jurisdiction before subject-matter jurisdiction in a removed case.[11]

[10] Of course, in a removal context, the granting of a motion to remand does not render the personal-jurisdiction issue moot; it still must be determined by the state court on remand.

[11] In footnote 4 of their Brief in Opposition, Respondents cite six recent district court cases in the Second Circuit which have followed the *Rhulen* rule: *United States v. Carpentieri*, No. 96-Civ.-6460, 1998 WL 749042, at *2 (S.D.N.Y. October 26, 1998); *Seemann v. Maxwell*, 178 F.R.D. 23, 25 n.1 (N.D.N.Y. 1998); *Madanes v. Madanes*, 981 F. Supp. 241, 249 (S.D.N.Y. 1997); *Integrated Utils., Inc. v. United States*, No. 96-Civ.-8983, 1997 WL 529007, at *2 (S.D.N.Y. August 26, 1997); *Sanger v. Reno*, 966 F. Supp. 151, 159 (E.D.N.Y. 1997); *Sanchez-Preston v. Luria*, No. CV-96-2440, 1996 WL 738140, at *2 (E.D.N.Y. Dec. 17, 1996). None of those cases were cases removed to federal court from state court; all were filed originally in federal court. Only two of the six cases, *Madanes* and *Seemann*, involved motions to dismiss under both Rule 12(b)(1) and Rule 12(b)(2). In both *Madanes* and *Seemann*, there was no basis for contending that judicial economy would be served by first addressing the question of personal jurisdiction. In *Seemann*, the absence of complete diversity appeared on the face of the complaint and there was no allegation of fraudulent joinder. 178 F.R.D. at 24-25. In *Madanes*, only two of ten defendants moved to dismiss for lack of personal jurisdiction, and the court therefore was required to address the subject-matter jurisdiction issue regardless of the

The mandatory rule adopted by the Fifth Circuit in this case is in direct conflict with the discretionary rule approved by the Second Circuit in *Cantor Fitzgerald*. Given the importance of the question to the federal district courts in the management of their dockets and the direct conflict between the Second and Fifth Circuits on the question, certiorari review is warranted.

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disposition of the personal-jurisdiction question. 981 F. Supp. at 260. Respondents fail to mention *Aerogroup Intern., Inc. v. Marlboro Footworks Ltd.*, 956 F. Supp. 427, 429 n.3 (S.D.N.Y. 1996), in which the district court held that *Cantor Fitzgerald* permitted dismissal of the case for lack of personal jurisdiction notwithstanding an unresolved challenge to subject-matter jurisdiction because the question of subject-matter jurisdiction was "not easily resolved" and personal jurisdiction was a "simpler ground" for disposing of the case.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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